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Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1085

ELISHA COMBS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. _____

ELISHA COMBS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 10, 1972.

OPINIONS BELOW

The opinion of the District Court is unreported and set forth in the Appendix, p. 19, herein. The opinion and order denying Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit are unreported and set forth in the Appendix, p. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 10, 1972. Petition for Rehearing was denied January 8, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether an affidavit for a search warrant showing the presence of firearms in the residence of Pearl Combs, and a search warrant issued pursuant thereto for "the premises" of Pearl Combs, including Pearl Combs' house and "all out-buildings and vehicles thereon. * * * including any and all adjacent properties used by the said Pearl Combs", was constitutionally sufficient to authorize the search and seizure of a Cadillac automobile owned by the petitioner, a visiting adult son of Pearl who lived over two hundred miles away, parked nearby on the property of one Ollie Taylor in a "community parking area" used by the Taylors, Pearl Combs and others.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States:

IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

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STATEMENT

Petitioner was indicted for illegal possession of firearms under 28 U.S.C. §§ 5861 (c) and (d), 18 U.S.C. Appendix § 1202 (a), and 18 U.S.C. §§ 922 (j) and 2315 solely because:

On October 13, 1970, in the evening hours, the Chief of Police of the City of Hazard, Kentucky, received a telephone call from the Newport, Kentucky, Police Department requesting assistance in arresting Raymond Combs, a son of Pearl Combs, for whom they had a warrant. Pearl Combs, father of Raymond, lived in an area adjacent to the City of Hazard known as "Gorman Hollow". In urbane language, the area may be described as a suburb to an appalachian city. (Appendix, p. 31).

The petitioner, also son of Pearl, was visiting his father. Elisha lived in Northern Kentucky, over two hundred miles away. In the mountains of Eastern Kentucky, unlike most suburbs, the country consists of creeks and hollows between mountains with parking areas a severe problem. Here, Pearl's adjoining property owner, one Ollie Taylor, had done the neighborly thing by establishing a "community parking area" on his property, where he, Pearl, tradesmen and others driving to the neighborhood parked. The Cadillac of the petitioner, Elisha Combs, was parked on the Taylor property in that parking area with 3 or 4 other cars, approximately seventy-five feet from his father's house. (Appendix, pp. 31, 39, 41-42).

This was the situation when the Chief of Police and other Hazard City Police arrived at the Pearl Combs residence. Raymond, who they were seeking, jumped off the porch and fled the scene. The officers entered the house, found a large quantity of firearms and ammunition, and left to obtain a search warrant. While there, they saw the petitioner's Cadillac in the community parking area, car-

rying a Campbell County, Kentucky, tag (indicating it was from Northern Kentucky), with a spare tire in the back seat and sitting low in the rear. They returned to Hazard, determined that Pearl Combs and the petitioner had been convicted of a felony, made an affidavit and obtained the search warrant in issue from the United States Commissioner, who was awaiting them in Hazard. (Appendix, pp. 32-34).

The affidavit for search warrant reads:

"BEFORE Kelly Clore, Pineville, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

> The Pearl Combs residence consisting of a one story frame dwelling painted white with 5 or 6 rooms, basements, attics, and appurtenances and having a porch on the West and North sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the East side of the Gorman Hollow Road, approximately 1 mile from the junction of the Gorman Hollow Road and Kentucky State Highway 451, and being approximately 50 yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately ½ mile, in a Southerly direction, from the old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs

in the Eastern District of Kentucky

there is now being concealed certain property, namely

> A large number of illegally possessed firearms and ammunition including automatic, Pump, Single barrel and double barrel Shotguns, Automatic, Bolt Action Repeaters, and single shot 22 calibre

rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms, and also various types of ammunition

which are Illegally possessed by Pearl Combs who is a convicted felon

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I, the Chief of Police of Hazard, Kentucky, on October 13, 1970, at approximately 9:30 P.M., while on official duty attempting to execute an arrest warrant, together with Police Officers Robert G. Byrgo, Edgar Reynolds Jr., and Captain George R. Smith, saw in the house situated on the Pearl Combs premises, a large number of firearms and ammunition some of which firearms were covered with blankets and sheets, some in uncovered stacks, and some sitting in corners, behind doors, and along the walls of said house. I personally know that Pearl Combs is a convicted felon. I make this affidavit at 2:10 A.M., on October 14, 1970.

/s/ Sam L. Luttrell,
Signature of Affiant.
Chief of Police, Hazard, Kentucky,

Sworn to before me, and subscribed in my presence, October 14, 1970

/s/ Kelly Clore,
United States Commissioner."

(Appendix, pp. 27-28).

The search warrant reads:

"To: ATF Special Investigators Donald F. Nierengarten and James L. Brown or any other authorized officer.

Affidavit having been made before me by Sam L. Luttrell, Chief of Police, Hazard, Kentucky.

that he is positive that on the premises known as

> The Pearl Combs residence, consisting of a one story frame dwelling painted white with five or six rooms, basements, attics, and appurtenances, and having a porch on the west and north sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the east side of the Gorman Hollow Road, approximately one mile from the junction of the Gorman Hollow Road and Kentucky State Highway 415, and approximately fifty yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately one-half mile, in a southerly direction, from old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs

in the Eastern District of Kentucky,

there is now being concealed certain property, namely

> a large number of illegally possessed firearms and ammunition, including automatic, pump, single barrel and double barrel shotguns, automatic bolt action repeaters and single shot 22 caliber rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms and also various types of ammunition

which are illegally possessed by Pearl Combs who is a

> convicted felon, in violation of Title 18, USC, Section 1202 (a) (1).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named by the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14th day of October, 1970

/s/ Kelly Clore,
U.S. Commissioner."

(Appendix, pp. 29-30).

The Hazard Police and ATF Agents returned to the premises, searched the Pearl Combs residence, found and seized the firearms, and searched some of the automobiles in the Taylor parking area. (Appendix, pp. 36-38).

The officers then went to the Cadillac. The spare tire was still in the back seat, the rear end was still low, and the officers started to search it. Petitioner offered a key to the ignition but refused to open the trunk. The officers forced it. On opening the trunk, the officers observed firearms, ammunition and other goods. They closed the trunk, drove the car into the City of Hazard and conducted a thorough search and inventory of the trunk.

The District Judge, knowledgeable in the area, made these specific findings:

"I have given this matter considerable thought, Gentlemen, and I am concerned with the search of the Cadillac automobile. I don't think there is any question on the evidence that was adduced here that these officers had authority to go in with this warrant of arrest on file and search this house for the defendant, Raymond Combs, and while they had the information

and thought they had seen him there on the porch and that he went in the house, and an apparent effort was made to divert their attention, I think they were entitled to go in there with the arrest warrant.

But I am gravely concerned about the search of the Cadillac automobile. It is not described in the search warrant. It was located on somebody else's property, and on top of that, they didn't search it at the scene. They started to prize it open, took some things out of it and put them all back in it and took it to the Police Station and proceeded to search it there some two or three hours later. I don't believe there was probable cause for the search of the Cadillac automobile, and to that extent the Motion to Suppress is sustained — as to the search of the car, and any evidence obtained thereunder.

As to anything found in the house at the time of the attempt to execute the warrant of arrest for the defendant, Raymond Combs, the motion to Suppress is overruled, and it is so ordered."

* * *

"Of course, another question, they may overrule the Court's ruling. But, I just don't believe you can stretch the wording of that affidavit for the search warrant, and the search warrant, to include this automobile sitting down there on apparently what is kind of a community parking space and not even on this property. In addition to those factors, there was nothing to preclude them from getting a search warrant for the car."

ARGUMENT

THE AFFIDAVIT FOR AND THE SEARCH WARRANT BASED THEREON WERE NOT CONSTITUTIONALLY SUFFICIENT TO AUTHORIZE SEARCH AND SEIZURE OF THE CADILLAC.

The District Court aparently decided this case on the basis of *Coolidge* v. *New Hampshire,* 403 U.S. 443, for immediately preceding his oral ruling above set out, he said:

> "Mr. Combs: If your Honor please, did you get my last memorandum?
> The Court: About the Coolidge case?
> Mr. Combs: Yes.
> The Court: Yes, I got it Saturday and it destroyed part of my weekend by reading it." (Appendix p. 19)

In *Coolidge* this Court brought the automobile within the protection of the Fourth Amendment by using this language:

> "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. * * *" (403 U.S. at 461).

In *Coolidge* this Court goes on to illustrate that here, as there, a warrantless search is clearly unlawful, by saying:

> "* * * And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States — no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, on contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police

> detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant.' Carroll, supra, at 153, 69 L Ed at 551, 39 ALR 790, and the 'automobile exception', despite its label, is simply irrelevant." (403 U.S. 462).

The United States Court of Appeals for the Sixth Circuit reversed this case, upon the concept that the affidavit and search warrant for Pearl's premises were sufficiently broad to embrace the petitioner's Cadillac on Taylor's land:

> "The record indicates that the Cadillac was on 'the premises' situated closely enough to the house to be within legal concept of curtilage. See Fine v. United States, 207 F. 2d 324 (6th Cir. 1953); United States v. Potts, 297 F. 2d 68 (6th Cir. 1961). The record also indicates that this house was located in a remote area. The arsenal found therein could hardly have been brought there by any means other than automobile. Under these circumstances we feel it was permissible for the Commissioner to infer from the facts before him probable cause to believe that vehicles on the premises contained similar weapons to those found in the house." (Appendix, p. 25).

The Court of Appeals apparently became derailed by this Court's holding in *United States* v. *Ventresca*, 380 U.S. 102, where the Court held that a non-technical reading of the affidavit should be made. With this we agree. But where we leave the Court of Appeals is when that Court adopts the concept that an affidavit for a search warrant, showing the probable commission of a crime in the home of a citizen, permits the issuance of a search warrant of sufficient scope and breadth to authorize officers to search not only all the premises of the citizen involved, but also to search automobiles of others in a community parking area off the premises. We differ even

more strongly when that Court holds that may be done at random, depending upon the whim of the officers, when the officers observed the very same automobile prior to the search and had ample opportunity to secure a specific search warrant for it. What we are saying is that we abhor the very notion that a peace officer may, by a search warrant directed toward one person's premises, ransack every automobile in the area.

The most this Court held in *Ventresca* is that a nontechnical reading of the affidavit should be made, with a liberal construction in favor of upholding the validity of the warrant. But here the warrant is admittedly valid. Only its scope is in issue. *Ventresca* clearly does not apply.

The Court of Appeals misconceived the facts when it said in its opinion that the Cadillac was on "the premises" by misconstruing "the premises" to embrace adjoining lands of others and automobiles of others thereon.

The words in the warrant, authorizing the search of "the premises" of Pearl Combs, including the house and "all buildings and vehicles thereon . . . including any and all adjacent properties used by the said Pearl Combs" must be construed in the light of the purpose of the search. The firearms were observed in the Pearl Combs dwelling. The warrant could, without Fourth Amendment hazard, be extended to the premises, including the entire curtilage. The Commissioner did so, using "the premises" as his target. Properly construed, it designated the Pearl Combs premises, including the dwelling house, all buildings, vehicles and areas *on the premises* "used by the said Pearl Combs." Otherwise, it is unconstitutionally vague and overbroad.

Property adjacent to the Pearl Combs premises could be anywhere in the neighborhood. And "adjacent properties used by the said Pearl Combs" could conceivably

embrace any nearby streets, highways, public and private parking areas, or even residences, barns and out buildings of neighbors used by him in any degree.

The holding of the Court of Appeals does not even stop there. The Court goes on to say that the officers were authorized to search not only vehicles and the like owned by Pearl Combs on "adjacent property" but also any property of others of whatsoever kind or nature on "adjacent" property. In short, the Court of Appeals held that the officers here involved were constitutionally equipped under the search warrant to search any property of any kind and nature, from baby carriages to coffins, regardless of ownership, so long as the property ransacked was on "adjacent properties" used by Pearl Combs.

We feel that the decision of the Court of Appeals demonstrates blatent disregard of this Court's constant warning that the Fourth Amendment should receive a liberal construction so as to prevent stealthy encroachment upon or gradual depreciation of the rights secured by it, whether by imperceptible practice of Courts or by well intentioned but mistakenly overzealous executive officers.

The Court of Appeals, while noting that the ground on which the Cadillac was parked may not actually have belonged to Pearl Combs, nevertheless held that the Cadillac, owned by the petitioner, on the property of another, was "on 'the premises' situated closely enough to the house to be within legal concept of curtilage. See *Fine* v. *United States*, 207 F. 2d 324 (6th Cir., 1953); *United States* v. *Potts*, 297 F. 2d 68 (6th Cir., 1961)." (Appendix, p. 25).

Fine and *Potts* do not so hold.

In *Fine*, the illegal evidence sought to be suppressed was not found in the house of Fine, but was found in a shed in the back yard of the Fine premises. In that case the Court said:

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> "It was not improper to extend the search to this shed. The warrant authorized search of the 'premises known as the Harve Fine residence' and of the 'place named.' These terms are broader than a mere description of the house and certainly include the curtilage. While the shed is protected from unreasonable search and seizure, Roberson v. United States, 6 Cir., 165 F. 2d 752; Baxter v. United States, 6 Cir., 188 F. 2d 119, it is not protected from a valid search." 207 F. 2d 325.

In *Potts*, a search warrant was not involved. In that case, the Revenue Agents observed the defendants under suspicious circumstances in and around the Potts premises, and a search of the smoke house behind the unoccupied dwelling yielded untaxed whiskey. Potts contended that the smoke house on his premises was within the "curtilage," and the Court agreed. But the Court went on to hold that there was probable cause for the belief that Potts and others were committing a felony, which justified an arrest without a warrant and as an incident the search and seizure complained of.

This brings us back to the crucial issue of whether the affidavit and search warrant, as construed by the Court of Appeals, is unconstitutionally vague and overbroad as it affects the Cadillac. We know of no better way to approach the problem than to revisit the Fourth Amendment to the Constitution of the United States:

IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The search and seizure of the Cadillac was based upon an oath or affirmation and with probable cause as to the premises of Pearl Combs. The finding of firearms in the dwelling house of Pearl Combs furnished probable cause for its issuance and the warrant properly embraced Pearl's property within the curtilage. It adequately described his premises and expressly included not only the dwelling but also the outbuildings and vehicles thereon.

It is constitutionally proper for the searching officers to search any motor vehicle situated on the premises as being within the "curtilage." See for example *Brooks* v. *United States,* 416 F. 2d 1044 (5th Cir., 1969).

The problem arose when the officers extended their search from the premises of Pearl Combs to the motor vehicles of others on Taylor's land. The affidavit stated no probable cause whatever for the searching of Taylor's land, and Taylor's land was in no way described or referred to. Moreover, the search warrant itself did not purport to extend to Taylor's land, did not describe Taylor's land and did not provide any method of identifying Taylor's land. Yet, the Court of Appeals says it was sufficiently broad to embrace Taylor's land, at least where the Cadillac was. We disagree. We are reminded of the words of this Court in *Terry* v. *Ohio,* 392 U.S. 1, 17:

> "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States 353 US 346, 1 L Ed 2d 876, 77 S Ct 828 (1957); Go-Bart Importing Co. v. United States, 282 US 344, 356-358, 75 L Ed 374, 381-383, 51 S Ct 153 (1931); see United States v. Di Re, 332 US 581, 586-587, 92 L Ed 210, 216, 68 S Ct 222 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. Warden v.

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Hayden 387 US 294, 310, 18 L Ed 2d 782, 794, 87 S Ct 1642 (1967) (Mr. Justice Fortas, concurring); see, e.g., Preston v. United States, 376 US 364, 367-368, 11 L Ed 2d 777, 780, 781, 84 S Ct 881 (1964); Agnello v. United States, 269 US 20, 30-31, 70 L Ed 145, 148, 46 S Ct 4, 51 ALR 409 (1925)."

United States v. *Hinton,* 219 F. 2d 324 (7th Cir., 1955) clearly illustrates the point. There two apartments were involved, occupied by different residents. Here there are two residences involved, the Pearl Combs residence and the Ollie Taylor residence. The Court forcefully announced and applied the constitutional premise that where two separate residences, or apartments, are occupied by different individuals, probable cause must be shown for searching each house or apartment. Absent such probable cause as to one, the search warrant must of constitutional necessity be confined solely to the other. *Annotation*: 11 ALR 3d 1330.

The warrant is likewise fatal for another reason pointed out in the Fourth Amendment and in *Hinton.* The Fourth Amendment requires that the warrant particularly describe "the place to be searched." In *Hinton,* the Court noted this requirement and defined it as such a description as to enable the officers who are commanded to make the search to identify the specific place for which there is probable cause to believe that a crime is being committed.

"General warrants," first condmned in *Entick* v. *Carrington,* 19 How St Tr 1029, motivated the Fourth Amendment. In prohibiting them, the Amendment makes general searches impossible. *Berger* v. *New York,* 388 US 41, 58.

This requirement is usually satisfied by giving the name of the occupant of the premises and/or describing its general location. This is usually adequate, and under *Ventresca,* the liberal interpretation of the affidavit and

warrant, coupled with the practical situation, has generally led the Courts to uphold the sufficiency of the description. *Steele* v. *United States,* 267 U.S. 498, 503.

But here the Taylor premises are not described by name, location or otherwise. The Court of Appeals says that they are embraced in with the concept of adjacent premises. But even the liberal construction announced in *Ventresca* could not bring "adjacent properties" within the constitutional requirement of "particularly describing the place to be searched."

There is no showing of probable cause to extend the search to the "adjacent" Taylor premises, making the warrant invalid as to the Taylor property even if described in the warrant. *Giordenello* v. *United States,* 357 U.S. 480; *United States* v. *Rich,* 407 F. 2d 934 (5th Cir., 1969).

We now turn to the Cadillac itself. If no probable cause was shown to extend the warrant to the Taylor property and the warrant by its terms did not describe the Taylor property, the only constitutional basis for upholding the search under *Coolidge* is to hold that probable cause for the searching of the Cadillac was set forth in the affidavit and the Cadillac itself was directed to be searched in the warrant. We need not reiterate that the officers observed the Cadillac, with the spare tire in the back seat and its rear end sitting low at the same time they observed the firearms in the Pearl Combs residence and the United States Commissioner was awaiting their return to Hazard for the purpose of accepting their affidavit for such search warrants as might be needed. *Taylor* v. *United States,* 286 U.S. 1.

The Cadillac is not mentioned in the affidavit in any way, no probable cause was shown in the affidavit as to it, and the search warrant made no effort to identify it and direct its search and seizure. Again the Courts have

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been liberal under *Ventresca* in permitting automobiles to be identified where this can be done by the officers as a practical matter on the ground. *Annotation*: 47 ALR 2d 1444. But we are unable to find any case, and surely there is none, where any Court anywhere has permitted the search and seizure of an automobile not on the premises to be searched, without probable cause as to the automobile and without any mention or description of the automobile in either the affidavit or warrant.

The decision of the Court of Appeals is tantamount to giving the Hazard Police and the ATF officers a blanket warrant to search the neighborhood of Pearl Combs, including adjacent streets, parking areas and the like, with authority to search and seize any motor vehicle owned by anyone on any such street or parking area, without probable cause and without describing the motor vehicle.

We do not need to remind this Court of the history of the Fourth Amendment and the purpose which the framers of our Constitution intended it to serve. The many decisions of this Court vigorously protecting and liberally construing this amendment will not permit it to be eroded in this manner.

CONCLUSION

Our conception of the Fourth Amendment is that it strongly prohibits the issuance of shotgun search warrants, and restrains peace officers from using a proper search warrant in an overreaching manner. This is what the right of the people to be secure in their persons, houses, papers, and effects, is all about. The search here is not only unreasonable, it is absurd. The officers searched a number of cars off the Pearl Combs premises before searching petitioners', and no doubt they would have wantonly ransacked other vehicles in the area if petitioner's trunk

had not yielded enough evidence to satisfy their official gluttony. We suggest that this is a serious constitutional issue, in dire need of definitive guidelines. The place and time to provide them is here and now. We ask the Court to do so.

Respectfully submitted,

C. KILMER COMBS
207 Caroline Avenue
Pikeville, Kentucky 41501
Attorney for Petitioner

APPENDIX

UNREPORTED ORAL OPINION OF THE DISTRICT COURT

[181] THE COURT:

Let the record show the defendants and their counsel are present in the courtroom and the attorney for the United States is present in the courtroom.

Gentlemen, I have read your respective memoranda. Do you have anything further to advance on this subject?

MR. COMBS:

If your Honor Please, did you get my last memorandum?

THE COURT:

About the Coolidge case?

MR. COMBS:

Yes.

THE COURT:

Yes, I got it Saturday and it destroyed part of my weekend reading it.

I have given this matter considerable thought, Gentlemen, and I am concerned with the search of the Cadillac automobile. I don't think there is any question on the evidence that was adduced here that these officers had authority to go in with this warrant of arrest on file and search this house for the defendant, Raymond Combs, and [182] while they had the information and thought they had seen him there on the porch and that he went in the house, and an apparent effort was made to divert their attention, I think they were entitled to go in there with the arrest warrant.

But I am gravely concerned about the search of the Cadillac automobile. It is not described in the search warrant. It was located on somebody else's property, and on top of that, they didn't search it at the scene. They started to prize (sic) it open, took some things out of it and put them all back in it and took it to the Police Station and proceeded to search it there some two or three hours later. I don't believe there was probable cause for the search of the Cadillac automobile, and to that extent the Motion to Suppress is sustained — as to the search of the car, and any evidence obtained thereunder.

As to anything found in the house at the time of the attempt to execute the warrant of arrest for the defendant, Raymond Combs, the Motion to Suppress is overruled, and it is so ordered.

* * *

[184] Of course, another question, they may overrule the Court's ruling. But, I just don't [185] believe you can stretch the wording of that affidavit for the search warrant, and the search warrant, to include this automobile sitting down there on apparently what is kind of a community parking space and not even on this property. In addition to those factors, there was nothing to preclude them from getting a search warrant for the car.

* * *

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
JACKSON

CRIMINAL NO. 10,302

UNITED STATES OF AMERICA,
PLAINTIFF,

vs.

ELISHA COMBS,
PEARL COMBS,
DEFENDANTS.

ORDER

(Filed December 8, 1971)

On December 6, 1971 at Lexington came the United States Attorney, Eugene E. Siler, Jr., the defendants in person and their attorney, Dan Jack Combs.

The Court heard counsel and being advised,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That the motion to suppress be and the same is hereby sustained insofar as the search of the Cadillac automobile owned by Elisha Combs is concerned, but said motion to suppress is in all other aspects overruled.

(2) The motion of United States for severance is sustained. The United States Attorney stated that the United States elects to try the defendant, Pearl Combs.

(3) It was further ORDERED that the case as to the defendant, Elisha Combs be and it is continued until the first day of the next regular session at Jackson, Monday, May 8, 1972.

December 8, 1971

/s/ BERNARD T. MOYNAHAN, JR.
JUDGE

Copies: U. S. Attorney
Dan Jack Combs

UNREPORTED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1137

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant,* v. ELISHA COMBS, *Defendant-Appellee.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed October 10, 1972.

Before: PHILLIPS, Chief Judge, EDWARDS and KENT, Circuit Judges.

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EDWARDS, Circuit Judge. The government appeals from the District Judge's grant of a motion to suppress evidence (a sawed-off shotgun) which had been seized after a search of defendant Elisha Combs' Cadillac automobile. The Cadillac had been parked in a lot adjoining the home of Elisha's father, Pearl Combs.

The facts in this case are complicated. They start with a phone call from the Police Chief of Newport, Kentucky, telling the Police Chief of Hazard, Kentucky, that he had an arrest warrant for Raymond Combs (another of the sons of Pearl Combs) for possession of stolen property. He said that Raymond might be in Hazard, driving a 1968 Chevrolet. The Hazard Police Chief thereupon went to Pearl Combs' house with three other officers. The testimony accepted by the District Judge was that as they approached the house, one of the officers who knew Raymond saw him on the porch and saw him turn and go into the house. The police entered the house and went through it thoroughly, observing in the process a large number of firearms. Raymond had escaped.

Thereupon the officers reported to the Newport Police Chief what had happened and he told them that Pearl Combs (and Elisha) had previously been convicted of a felony. The Hazard Chief then went to the United States Commissioner and obtained a search warrant for "the premises," including Pearl Combs' house and "all outbuildings and vehicles thereon, including any and all adjacent properties used by the said Pearl Combs."

The Hazard police then searched Pearl Combs' house and seized a veritable arsenal of weapons, including 48 firearms and over 500 rounds of ammunition. Also searched was a Cadillac automobile which the officers had observed parked about twenty feet from the house. It was a new Cadillac. It had the spare tire in the rear seat and the

car was sitting low to the ground in the rear. There is testimony that it was parked where the Combs family generally parked their cars, although it appears that the ground on which it was parked may not actually have belonged to Pearl Combs.

The officers asked Elisha for the key to the trunk and he denied that he had it. Shortly thereafter he slipped away from the officers and disappeared. Under these circumstances, they broke into the trunk and found a large inventory of stolen goods, and 29 shotguns, rifles and automatic weapons. The sawed-off shotgun which this appeal concerns was found later when the contents of the trunk were inventoried at the police station.

We believe that the warrant, under a nontechnical reading, *see United States* v. *Ventresca*, 380 U.S. 102 (1965), authorized what the officers did here. The principal question appears to us to be whether or not the information supplied to the Commissioner was adequate to support the breadth of the warrant. We conclude that the affidavit was sufficient in this respect.

While the affidavit supplied no information relating directly to the new Cadillac where the sawed-off shotgun was found, it did supply ample facts to establish probable cause to believe a crime was being committed. The Hazard Police Chief swore.

> "[T]he facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I, the Chief of Police of Hazard, Kentucky, on October 13, 1970, at approximately 9:30 P.M., while on official duty attempting to execute an arrest warrant, together with Police Officers Robert G. Byrgo, Edgar Reynolds, Jr., and Captain George R. Smith, saw in the house situated on the Pearl Combs premises, a large number of firearms and ammunition some of which firearms were covered with blankets

and sheets, some in uncovered stacks, and some sitting in corners, behind doors, and along the walls of said house. I personally know that Pearl Combs is a convicted felon. I make this affidavit at 2:10 A.M., on October 14, 1970."

The record indicates that the Cadillac was on "the premises" situated closely enough to the house to be within legal concept of curtilage. *See Fine* v. *United States*, 207 F.2d 324 (6th Cir. 1953); *United States* v. *Potts*, 297 F.2d 68 (6th Cir. 1961). The record also indicates that this house was located in a remote area. The arsenal found therein could hardly have been brought there by any means other than automobile. Under these circumstances we feel it was permissible for the Commissioner to infer from the facts before him probable cause to believe that vehicles on the premises contained similar weapons to those found in the house.

The District Judge appears to have decided this case on the strength of *Preston* v. *United States*, 376 U.S. 364 (1964). It appears to us, however, that a later case, *Chambers* v. *Maroney*, 399 U.S. 42 (1969), sanctions the police station inventory which was conducted here — particularly since in fact the officers who made the search had secured a search warrant which by its terms authorized it.

The judgment of the District Court is reversed and the case is remanded for further proceedings.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

No. 72-1137

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

ELISHA COMBS,
Defendant-Appellee.

ORDER

(Filed January 8, 1973)

Before: PHILLIPS, Chief Judge, EDWARDS and KENT, Circuit Judges.

On motion for rehearing of the above-styled case, appellant's counsel for the first time attacks the adequacy of the affidavit to support the search warrant issued in the instant case, relying primarily upon *United States* v. *Bass*, 404 U.S. 336 (1971). No such issue was presented before the District Court which found the search warrant valid, nor was any such issue presented on appeal.

The motion for rehearing is denied, no active judge of this court having moved for rehearing in banc. *See Burnet*

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v. *Commonwealth Improvement Co.*, 387 U.S. 415, 418 (1932). *See also Helvering* v. *Wood*, 309 U.S. 344, 349 (1940).

Entered by order of the court

/s/ JAMES A. HIGGINS
Clerk

AFFIDAVIT FOR SEARCH WARRANT

"BEFORE Kelly Clore, Pineville, Kentucky

The undersigned being duly sworn deposes and says:

That he is positive that on the premises known as

The Pearl Combs residence consisting of a one story frame dwelling painted white with 5 or 6 rooms, basements, attics, and appurtenances and having a porch on the West and North sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the East side of the Gorman Hollow Road, approximately 1 mile from the junction of the Gorman Hollow Road and Kentucky State Highway 451, and being approximately 50 yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately ½ mile, in a Southerly direction, from the old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs

in the Eastern District of Kentucky

there is now being concealed certain property, namely

> A large number of illegally possessed firearms and ammunition including automatic, Pump, Single barrel and double barrel Shotguns, Automatic, Bolt Action Repeaters, and single shot 22 calibre rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms, and also various types of ammunition

which are Illegally possessed by Pearl Combs who is a convicted felon

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: I, the Chief of Police of Hazard, Kentucky, on October 13, 1970, at approximately 9:30 P.M., while on official duty attempting to execute an arrest warrant, together with Police Officers Robert G. Byrgo, Edgar Reynolds, Jr., and Captain George R. Smith, saw in the house situated on the Pearl Combs premises, a large number of firearms and ammunition some of which firearms were covered with blankets and sheets, some in uncovered stacks, and some sitting in corners, behind doors, and along the walls of said house. I personally know that Pearl Combs is a convicted felon. I make this affidavit at 2:10 A.M., on October 14, 1970.

/s/ Sam L. Luttrell,
Signature of Affiant.

Chief of Police, Hazard, Kentucky,

Sworn to before me, and subscribed in my presence, October 14, 1970

/s/ Kelly Clore,
United States Commissioner.

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SEARCH WARRANT

To: AFT Special Investigators Donald F. Nierengarten and James L. Brown or any other authorized officer.

Affidavit having been made before me by Sam L. Luttrell, Chief of Police, Hazard, Kentucky.

that he is positive that on the premises known as

> The Pearl Combs residence, consisting of a one story frame dwelling painted white with five or six rooms, basements, attics, and appurtenances, and having a porch on the west and north sides. Said premises also include all outbuildings and vehicles thereon. Said premises are situated on the east side of the Gorman Hollow Road, approximately one mile from the junction of the Gorman Hollow Road and Kentucky State Highway 415, and approximately fifty yards below and across the Gorman Hollow from the Bradley Baker residence, and being in Perry County, Kentucky, and approximately one-half mile, in a southerly direction, from old city limits line of the city of Hazard, Kentucky, and including any and all adjacent properties used by the said Pearl Combs
>
> in the Eastern District of Kentucky,

there is now being concealed certain property, namely

> a large number of illegally possessed firearms and ammunition, including automatic, pump, single barrel and double barrel shotguns, automatic bolt action repeaters and single shot 22 caliber rifles, some of said rifles having telescopic sights, and various and sundry types of other illegally possessed firearms and also various types of ammunition

which are illegally possesed by Pearl Combs who is a convicted felon, in violation of Title 18, USC, Section 1202 (a) (1).

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named by the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14th day of October, 1970

/s/ Kelly Clore,
U.S. Commissioner.

TESTIMONY IN THE DISTRICT COURT

Excerpts from Testimony of Bob Byrge, Hazard City Patrolman

[21] Q. Did you all go to the Combs residence in one vehicle, or more than one?

A. There was just one vehicle.

Q. Was that the Scout?

A. It was a Jeep.

Q. A Jeep?

A. Yes.

Q. About what time did you arrive at the residence?

A. Let's see — it took us around about, oh, fifteen minutes to get over there — to get up in the holler.

Q. What's the name of this hollow?

A Gorman Holler.

[22] Q. Do you know where Pearl Combs lives?

A. Yes, sir, I do.

Q. Is that inside or outside the City limits of Hazard?

A. That's outside the city.

Q. About how far?

A. Oh, about a hundred yards as the crow flies.

Q. What do you mean "a hundred yards as the crow flies?

A. Well, by the road, maybe it's not hardly a quarter of a mile.

* * *

Q. All right, where did you all park in rela- [23] tion to the Pearl Combs residence?

A. We parked up the road above the house.

Q. About how far up?

A. Twenty-five or thirty yards, maybe.

Q. Did you see some vehicles parked there above the house, beside the road?

A. Yes, sir.

Q. How many vehicles did you see?

A. Let's see — they was about four or five.

Q. Did you see a gray Cadillac there?

A. No, sir, it wasn't gray.

Q. Huh?

A. It wasn't gray.

Q. What color was it? Did you see a Cadillac there?

A. Yes, sir.

Q. What kind was it?

A. It was a '69 DeVille, rose colored, four-door.

Q. You parked up the road beyond this Cadillac?

A. Yes, sir.

* * *

[37] Q. All right. Now, when did you first notice this Cadillac that you described?

A. Well, the first time I saw it was when we went up to the house and pulled up above the house and come back down the road. We pulled above the house and then come back down the road.

Q. And you walked back by it coming back toward the house?

A. Yes, I believe we did.

Q. And did you know who owned the Cadillac?

A. No, sir, I didn't.

[38] Q. And then when you went from the house back to the Jeep you went by the Cadillac again?

A. Yes, sir.

Q. And did you see anything unusual about that Cadillac the first time?

A. Well, I never paid too much attention to it that first time.

Q. When did you first pay attention to it?

A. When we went back.

Q. And what did you pay attention to?

A. Well, I noticed it was setting down low on the ground, and had a spare tire in the back seat. Of course, we looked around, you knew.

Q. Now, then what did you do?

A. We got in the Jeep and left.

Q. Where did you go?

A. We went back to the Police Station.

Q. Then what did you do?

A. Well, I believe the Chief called Captain Garnick back, and then I went home.

Q. Did you hear the conversion between Captain Garnick and the Chief when he apparently called Captain Garnick?

A. No, sir, I didn't. I went on home.

Q. You didn't hear any of the telephone con- [39] versation?

A. No, sir, not the second time.

Q. Did you later return to the scene with the ATF officers?

A. Yes, sir, I did.

Q. Were you present when the United States Commissioner appeared in Hazard?

A. No, sir, I went home and got in bed and then they called me at the house.

Q. All right, now about what time did they call you?

A. Let's see — it was about 1:00 or 1:30, I'm not positive on the time.

Q. And then you went back to the police barracks?

A. Yes, sir.

Q. And who all was there when you returned?

A. Chief Luttrell, and Sgt. Reynolds, and Capt. Smith,

and ATF agents, Nierengarten and Brown, and the Commissioner.

Q. Is that United States Commissioner Clore?

A. Yes, sir.

Q. Were you present when Bud Luttrell signed an affidavit before the Commissioner?

A. Yes, sir.

[40] Q. Did you hear what Bud said to the Commissioner?

A. No, sir, I wasn't in the room when they made the search warrant out.

Q. You did not read the affidavit which was signed and sworn to by Chief Luttrell —

A. No, I did not.

Q. — that was filed with the United States Commissioner?

A. No.

Q. But you knew about this weighted rear end of the Cadillac and the wheel and tire in the back seat of the car before you went back to Hazard, didn't you?

A. (Witness indicating yes).

Q. And Chief Luttrell knew who that Cadillac belonged to, didn't he?

A. I don't know, sir. You would have to ask him.

Q. Do you know if he had any information available with reference to the type of car that Raymond Combs would likely be in?

A. Yes, sir, we did.

Q. What type of car did your information reveal?

A. It was a '68 Chevelle, gold color, and [41] they give us a license number off it.

Q. There wasn't any '68 Chevelle there, was there, that night?

A. No, sir, there wasn't.

* * *

Excerpts from Testimony of Edgar Reynolds, Sergeant, Hazard Police

* * *

[59] Q. I believe that – did you notice the Cadillac when you first went down the road from the Jeep to the house?

A. Yes, sir, I seen the Cadillac there.

Q. Did you notice it was kind of low in the rear?

A. Very low, yes, sir.

Q. Did you notice a wheel in the back seat?

A. Not right at that time, I did not.

Q. You learned that that was Elisha Combs during the time you were in the house, didn't you?

A. I was told by Elisha, yes, sir.

Q. Huh?

A. Elisha told us it was his car, yes, sir.

[60] Q. And that car was in the same shape and it was in the same position it was in when you all got back to the Combs house the second time, wasn't it?

A. Yes, sir.

Q. Did you leave anyone there to keep the place under surveillance until you went back the second time?

A. No, sir.

* * *

[64] Q. Now, you helped in the search of the Cadillac, didn't you?

A. Yes, sir.

Q. Who assisted you in that search?

A. Agent Brown, Captain Smith and Patrolman Byrge.

Q. Did Bud Luttrell help?

A. Not as I remember. I don't remember.

Q. Did Elisha tell you not to open the trunk.

A. Elisha said he did not have a key to the trunk of the car.

Q. Did he ask you or did you tell him that you had a search warrant?

A. We had a search warrant.

Q. Oh?

A. According to the search warrant, anything [65] on the premises or around the premises.

Q. Oh, I see, and it didn't describe this Cadillac, though, did it?

A. No, sir.

* * *

[68] Q. Why didn't you go get a search warrant for this car?

A. Why what, sir?

Q. Why didn't you get a search warrant for this car?

A. We had a search warrant for everything around the premises and everything on the premises.

* * *

[72] Q. Now, the only reason you all went into the trunk of that car was because you saw that it was weighted down in the rear and you saw the tire in the back seat? Now, isn't that the only reason you went in?

A. The only reason we went in, we had a search warrant for all guns, the house, the cars, or anything else that was on the property that Pearl Combs had.

Q. In other words, everything that you knew about that cadillac at the time you forcibly opened the [73] trunk of the car, you knew about it at 9:00 or 9:30 earlier that night?

A. We didn't know what was in the car, sir.

Q. That wasn't Pearl Combs' car, was it?

A. No, sir, it was Elisha Combs' car.

Q. But the warrant was for Pearl Combs' residence, wasn't it?

A. Yes, sir.

Q. And it was on the information that you had received when you went into Pearl's house, coupled with your knowledge that he had been convicted of a felony, that caused you to go get this search warrant in the first place, wasn't it?

A. Yes, sir.

Q. And that Cadillac had nothing to do with that offense against Pearl, did it?

A. Not to my knowledge.

Q. And the offense you were charging against Pearl had nothing to do with Elisha or his car, did it?

A. Not to my knowledge.

Q. There was about nine cars out there, wasn't there?

A. To the best of my knowledge, I only seen three, and one truck.

Q. And this was the only one you searched, wasn't it?

[74] A. No, sir, it was not.

Q. What?

A. We kind of looked through the other cars —

THE COURT:

I can't understand you. Did you search some of the rest of them?

A. Yes, sir, we kind of looked inside them. We didn't go into the trunk of any of them other than the Cadillac.

Q. And there was four cars down to the left of Pearl Combs' residence, wasn't there?

A. I think there was a house trailer down below Pearl's there somewhere.

Q. You didn't search any of those, did you?

A. And some junk cars.

Q. You didn't search any of those?

A. No, sir.

• • •

[79] Q. But you did see some cars to the left of the house?

A. Yes, sir.

Q. As you face Pearl's house standing on the main road?

A. Yes, sir.

Q. And that is to the left – that is the property to the left of Pearl's house, right?

A. On the left going up, right – going up.

Q. And did you search any of the cars that [80] were situated on the left of Pearl Combs' property?

A. No, sir.

Q. You just searched those on the righthand side of his house?

A. Yes, sir.

Q. And you don't know where the property line is between Pearl, or the righthand side of the house and his neighbor, do you?

A. No, sir, I do not.

Q. And you didn't know at that time?

A. No, sir.

* * *

Excerpts from Testimony of
Sam (Bud) Luttrell, Chief of Police, Hazard

[86] Q. And you saw the spare tire in the rear of the Cadillac then, and you noticed that the trunk was apparently loaded with something heavy, is that right?

A. On the way back to the Jeep I noticed that the spare tire for the Cadillac was laying in the back seat and that it was riding very low – looked like the back bumper was pretty low.

Q. And thereafter is when you went before the United

States Commissioner and signed the affidavit and got the search warrant for Pearl's residence, wasn't it?

A. That's right.

* * *

[100] Q. Did Elisha tell you not to open it?

[101] A. No, he just wouldn't give them the key.

Q. And who told them to get a crowbar?

A. Pardon?

Q. Did you hear anybody tell anybody to get a crowbar?

A. They told him if he didn't produce the key that they would have to force it. He had the ignition key, but he didn't have the key to the trunk.

Q. Was Elisha's car on Pearl's property or somebody else's property?

A. Well, it was parked right there close to the house where the whole family parks their cars.

Q. Was it on Pearl's property or someone else's property?

A. Man, I don't know who owns all that holler. It was right close to his house, though.

Q. About how far from his house was this Cadillac parked?

A. About as far as from here to that door out there?

Q. Would you say seventy-five feet?

A. Maybe.

* * *

Excerpts from Testimony of AFT Agent, James Brown

* * *

[133] Q. So you had the ignition key, and before you broke in the trunk, why didn't you drive the Cadillac to Hazard where the United States Commissioner was and obtain a warrant?

A. I didn't feel it was necessary.

Q. Mr. Combs was not trying to run off with the Cadillac, was he?

A. No, sir, I had the key.

Q. There was nothing exigent about the importance of going into the trunk of that car at that particular moment, was there?

[134] A. Well, I was there to search the residence and outbuildings, and so forth there, and had to search it while we were there. We had already searched the house and we started searching the vehicles.

Q. You didn't search all of them, though, did you?

A. Yes, sir, I did. All but the '60 Ford that was there that, I think, Mr. Combs said belonged to a neighbor that lived across the creek, or something, and we did not search it. It was locked. But there was a '57 Chevrolet there, and a pick-up truck and the Cadillac, and I did search all of them.

* * *

Excerpts from Testimony of Lester Combs, son of Pearl

* * *

[137] Q. Are you familiar with your dad's property lines up the hollow from the house?

A. Yes, sir.

Q. Who owns the property adjoining your dad there?

A. It's a bunch of heirs — Ollie Taylor — they ain't too many living right now. She's the one mostly that it belongs to right now.

Q. How far is the property line from your dad's home?

A. About seventy-five foot.

Q. There's a parking area up the creek from your dad's home, isn't there?

A. Yes, sir.

Q. And the Cadillac and some other cars were on this parking area?

A. Yes, sir.

Q. Who owns that property that that parking area is on?

A. Ollie Taylor.

THE COURT:

Who?

[138] A. Ollie Taylor.

* * *

[146] Q. And this particular parking location where the cars are parked in the picture, that's where the Cadillac and the pick-up truck were parked on the 13th and 14th of October, 1970?

A. That's right.

Q. And that's where your family generally parks when you go up to the house?

A. Sometimes we did and we wasn't supposed to, because they give us orders to not park out there any more.

Q. Who gave you orders?

A. Ollie Taylor.

Q. Ollie hadn't given you those orders in October, had she?

A. Yeah, she told us before then.

Q. But you had been using it?

A. Sometimes we did.

Q. And you had three cars belonging to the family there on the 13th and 14th of October, did you not?

A. Yes, sir.

Q. And whose Cadillac was that?

A. It was Elisha Combs'.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1085

ELISHA COMBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a search warrant issued for the search of his father's premises, specifically including the house and all outbuildings and vehicles and any and all adjacent properties used by the father, was insufficient to cover the search of petitioner's Cadillac parked on a lot less than 75 feet from his father's residence.

Petitioner was charged in the United States District Court for the Eastern District of Kentucky with having illegally possessed a sawed-off shotgun; with the illegal possession of a firearm after being convicted of a felony; with having received, concealed, and stored stolen firearms which had been transported in interstate commerce, knowing them to have been stolen; and with having knowingly received, concealed,

and stored stolen goods and merchandise valued in excess of $5,000, in violation of 26 U.S.C. 5861(c) and (d), of 18 U.S.C. App. 1202(a) and 18 U.S.C. 922(j) and 2315.[1]

Prior to trial, petitioner moved to suppress evidence seized in a search, pursuant to a warrant, of the house of his father, Pearl Combs, and of petitioner's Cadillac parked nearby. The trial court, after a hearing, overruled the motion with regard to the search of the house but sustained the motion with regard to the car. The government appealed pursuant to 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. 22–25).[2]

1. On October 13, 1970, pursuant to a request by the Newport, Kentucky, Police Department, the police chief of the city of Hazard, Kentucky, and three other officers went to the home of Pearl Combs to arrest his son, Raymond, for whom there was an outstanding arrest warrant (Tr. 19–20). When the officers arrived, Raymond, who was on the porch, went into the house. The officers went around the house and met Raymond's brother, Lester, who told them that Raymond was inside (Tr. 24–26, 146–149). Without objection, the officers entered the house to look for

[1] Another case involving the same petitioner was before the Court last term (408 U.S. 224). There the judgment affirming petitioner's conviction for possession of stolen whiskey was vacated and the case remanded for consideration of petitioner's standing to challenge the search and seizure of the whiskey. We are advised that the district court held that petitioner had no such standing, and his appeal is again before the Sixth Circuit.

[2] Pet. App. refers to petitioner's appendix; Tr. refers to transcript of the proceeding at the hearing on the motion to suppress.

Raymond; however, he had jumped off the porch and fled the scene. While inside the house the officers saw a large quantity of firearms and ammunition (Tr. 28-31). At the scene the officers also saw a Cadillac automobile in a parking area nearest the house. It had the spare tire in the back seat, was sitting low in the rear and bore a license tag from Campbell County, Kentucky, the county where Raymond lived (Tr. 85–86, 115).

The officers reported to the Newport police what had happened and found out that both Pearl Combs and petitioner had been previously convicted of a felony (Tr. 98–99, 114–115). Thereafter, the Hazard Police Chief obtained a search warrant upon an affidavit before a United States Commissioner authorizing the search of Pearl Combs' house and premises, specifically including any and all out-buildings and vehicles found thereon. It also authorized the search of any adjacent properties used by Pearl Combs (Pet. App. 27–29). Armed with the search warrant, the police returned to the house, conducted a search, and seized forty-eight firearms and more than 500 rounds of ammunition (see Tr. 107–108; and Inventory of Firearms seized from residence of Pearl Combs). The officers then proceeded to the parking location adjacent to the Combs residence. Although it was stated by a member of the Combs family that the parking area belonged to a neighbor, it was the location where the family generally parked their cars (Tr. 146–148). The Police Chief said he did not know who owned the lot but it was "right there close to the house where the whole family parks their cars"

(Tr. 101). At the time three family vehicles (including petitioner's Cadillac) were found on the lot and searched. The officers did not search any vehicle that did not belong to the Combs family (Tr. 134).

When the officers went to the Cadillac, it could be seen that the spare tire was still in the back seat and the rear remained low (Tr. 131–132). Petitioner was present at the time of the search of his car. He gave the officers the key to the ignition but denied that he had a key to the trunk. Petitioner was then told that the trunk would have to be forced open; when the police began to do so, petitioner slipped away, not to be seen again that day (Tr. 102–103, 132–133).

When the trunk was opened a large quantity of firearms and other merchandise was observed. Some were taken out and then replaced. Because it was dark, the automobile was driven to Hazard, where the officers could see, and an inventory was taken of the goods in the trunk (Tr. 102–106). A sawed-off shotgun, twenty-seven other firearms, a quantity of ammunition, typewriters, radios, cameras and blankets were found and seized (Tr. 126; and see Inventory of Firearms seized from petitioner's automobile). Later, upon a further search, several diamond rings were also found in the trunk (Tr. 109–110). The vehicle has since been the subject of a forfeiture action under 26 U.S.C. 7301, 7302, 7321 (Tr. 127).

2. Petitioner concedes here that "the warrant is admittedly valid" (Pet. 11), and that pursuant to the warrant it was "constitutionally proper for the searching officers to search any motor vehicle situated on the premises" (Pet. 14). Petitioner, however,

alleges that the search of petitioner's vehicle was improper because, though parked in an adjacent area "close to the house" (Tr. 101), it was on property owned by another. We submit that the court of appeals properly rejected the technical challenge to the search of an automobile belonging to a convicted felon, parked in an area adjacent to his family's house, where the law enforcement officers had just located an "arsenal" of weapons (Pet. App. 25).

a. The record supports the holding of the court of appeals that the warrant sufficiently covered the search of the car and that the information in the affidavit supplied to the Commissioner was adequate to support its breadth. The affidavit for the search warrant clearly stated that the affiant was positive that there were illegal firearms and ammunition concealed upon the premises. The premises were fully described as being the dwelling of Pearl Combs and "all outbuildings and vehicles thereon. * * * including any and all adjacent properties used by the said Pearl Combs." As the court below noted, the arsenal of weapons observed in the house could hardly have been brought to the remote location where the house was located by any means other than by automobile; under these circumstances it was permissible for the Commissioner to infer probable cause to believe that the vehicles on the premises contained weapons also.

Describing the premises as the dwelling of Pearl Combs and "all outbuildings and vehicles thereon. * * * including any and all adjacent properties used by the said Pearl Combs", did not, as petitioner claims, authorize a search of the entire neighborhood, nor did it render

the warrant unconstitutionally vague. Affidavits and warrants are to be interpreted in a common-sense manner. See *United States* v. *Ventresca*, 380 U.S. 102; *United States* v. *Harris*, 403 U.S. 573. Such a description in the affidavit and warrant describes no more than what is commonly referred to as curtilage (*i.e.*, those places which would be included within the scope of the warrant even if they had not been specifically described therein), which includes all places in close proximity to a dwelling necessary and convenient to the dwelling, and habitually used for family purposes. See, *e.g.*, *United States* v. *Potts*, 297 F. 2d 324 (C.A. 6); *Fine* v. *United States*, 207 F. 2d 324 (C.A. 6).

While the lot where petitioner's Cadillac was found may not have been owned by Pearl Combs, it was the nearest parking area to the Combs residence, it was regularly used by the Combs family for the purpose of parking their vehicles, and three family cars were parked there at the time of the search. In these circumstances the lot as well as petitioner's car were, for practical purposes, part of the premises subject to search under the warrant.

b. In any event, petitioner does not deny that there was probable cause to believe his car contained contraband at the time it was searched.[3] Thus, whether or

[3] The fact that the officers discovered the multitude of weapons in Combs' house, the discovery of the spare tire in the back seat, the low rear end of the automobile, the assertion of Elisha Combs that he did not have the trunk key to an almost new Cadillac, and the disappearance of Elisha Combs at the time the police asserted they were going to force open the trunk, presented sufficient probable cause for the officers to search the vehicle at that time.

not the warrant was broad enough to cover the car, the officers acted reasonably in searching the car promptly and impounding it for an inventory. See *Chambers* v. *Maroney,* 399 U.S. 42, 46–52. Unlike the situation in *Coolidge* v. *New Hampshire,* 403 U.S. 443, where four Justices concluded that a warrant should have been secured before the automobile was searched, the car in this case had not been immobilized by arresting its owner and by preventing any one else from driving it away. Thus, under the traditional exception to the warrant requirement, the search here, based on ample probable cause, was valid irrespective of the scope of the warrant for Pearl Combs' premises.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.

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Supreme Court of the United States

October Term, 1972

No. 72-1095

JAMES LEE STOCKWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. .....

JAMES LEE STOCKWELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, James Lee Stockwell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1973.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 11, 1973. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

1. Whether the judgment of the Court of Appeals to remand petitioner's case for re-sentencing violated petitioner's Fifth Amendment right to due process under the United States Constitution and his Eighth Amendment right not to be subjected to cruel and unusual punishment.

2. Whether the method by which the government, with the cooperation of the trial court, obtained the testimony of the two chief government witnesses deprived petitioner of due process of law under the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution

provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . . "

The Eighth Amendment to the United States Constitution provides, in relevant part:

> "Excessive bail shall not be required . . . *nor cruel and unusual punishments inflicted.*"

STATEMENT OF THE CASE

A six-count indictment charged petitioner and Jan Bruce Benken with counterfeiting offenses as follows: Count 1, conspiracy to commit counterfeiting with unindicted co-conspirators Gerald Frank Shaw, Kenneth Alvin Jones, James Melvin Armstrong, Clarence Oscar Forrest, Michael Ben Tomlin, Bobby Lee Evans, Judith Guilmette, David Wolfe, and David Gorwitz (18 U.S.C. Section 371); **Count 2**, possession of counterfeit notes (18 U.S.C. Section 472); and **Counts 3 through 6**, delivery of counterfeit notes to certain unindicted co-conspirators (18 U.S.C. Section 473) (C.T.[1] 1-9).

Petitioner and Benken entered pleas of not guilty and a jury trial began. (R.T.[2] 293-568.) The court declared a mistrial because of references by the prosecution to evidence that the court had previously ruled inadmissible. (R.T. 569.)

When the case was called for a second trial, counsel

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1. As used herein "C.T." refers to Clerk's Transcript

2. As used herein "R.T." refers to Reporter's Transcript.

for both defendants, the prosecutor and the judge had a conference in chambers. Stephen Miller, counsel for Benken, pointed out that after the first trial Benken had been convicted in the state court of two counts of assault with a deadly weapon and one count of possession of explosives, and had been sentenced to three consecutive terms of two years to life. Miller told the judge that he had discussed the case with Benken's counsellor at Chino and had learned that there was a possibility of parole "in three years or more, and perhaps longer." (R.T. 582.) Miller pointed out that Benken "had a couple of arrests and no prior convictions" (R.T. 584), other than the state bombing convictions. Miller suggested a three-year sentence to run concurrently with the state sentences if Benken entered a guilty plea. (R.T. 586.) The government took no position on sentence, leaving it entirely to the court. (R.T. 487.) The judge then agreed, in view of the state sentences, to sentence Benken to a three-year term to run concurrently with the state sentence. (R.T. 587-88.)

The discussion then turned to the possibility of a guilty plea by petitioner. The prosecutor pointed out that petitioner had been convicted of mail fraud in another department of the court and that he had not yet been sentenced. (R.T. 588-89.) The judge then asked about the relative extent of participation in the counterfeiting offenses by petitioner as compared to Benken. The prosecutor answered: "Yes, I would say the guilt of it would be equal, your Honor." (R.T. 589.) Counsel for petitioner advised the judge that although petitioner, like Benken, had been arrested previously, he had no other convictions and that he was then working for a land development company in Sherman Oaks. (R.T. 590.)

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The following colloquy then took place:

"THE COURT: Well, I can tell you in advance, if he is convicted, about what he will get. I can give you some idea.

"MR. BUSBY: I am interested in some idea.

"THE COURT: In view of what has transpired in this case, I would say he would come off with no less than five years.

"MR. BUSBY: That is what you told me the last time.

"THE COURT: If he is convicted. I say not less, now. I don't know whether some of the judges have the intestinal fortitude to let the lawyers know these things. I don't know what is wrong with the Socratic method, which is open discussion of these things. It certainly wouldn't change my presentation of the case permitting you every defense that you are entitled to.

"MR. BUSBY: Absolutely, I understand that, sir.

"THE COURT: It is not going to make me presume that he is guilty.

"MR. BUSBY: I realize that.

"Also, I assume your position would be different in a plea situation.

"THE COURT: Well, I don't know.

"What does the government have in mind; anything on that?

"MR. WALTER: Again, your Honor, it is

entirely within your discretion. We take no position on the matter.

"THE COURT: A plea to one count?

"MR. BUSBY: Yes, sir.

"MR. MILLER: Yes, sir.

"THE COURT: My offhand reaction is three years. If you lose –

"MR. BUSBY: I –

"THE COURT: You are in a tough spot. If you lose you may get three or four more. It really puts a lawyer in sort of a tough predicament, doesn't it?" (R.T. 590-91.)

Petitioner decided to plead not guilty and to exercise his constitutional right to a jury trial. (R.T. 592.) Benken then pleaded guilty on Count 4 and was sentenced to three years imprisonment. (R.T. 601-02; C.T. 51.) This sentence was to be concurrent with the state sentence. (R.T. 594-97.) However, the court made it clear that the federal sentence was an independent three-year term, to be served even if Benken won a reversal on appeal of the state sentence. (R.T. 594-97.) The court later dismissed the remaining counts against Benken. (C.T. 62.)

Petitioner was tried and convicted on Counts 1-4 and 6.[3] (C.T. 61.) The trial judge sentenced petitioner to five years on Count 1 and seven years on each of Counts 2, 3, 4, and 6, all sentences to run concurrently. (R.T. 954-55; C.T. 66.) Thus, on Count 4, petitioner received a sentence four years longer than the sentence of Benken on the same count.

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3. The case did not go to the jury on Count 5.

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At the second trial the government called several of petitioner's alleged co-conspirators as witnesses. Kenneth Jones and Gerald Shaw, charged as unindicted co-conspirators (C.T. 1) were the two chief prosecution witnesses. Jones was arrested for his participation in the alleged conspiracy, was charged with four counterfeiting counts in a separate indictment with Shaw and Clarence Oscar Forrest (App.[4] at 18-23), first entered a plea of not guilty (App. at 26), and then pleaded guilty to Count 1 (conspiracy to commit counterfeiting) on May 25, 1971 (App. at 28; R.T. 719-20). Jones testified for the government on January 18, 1972, nearly eight months after his guilty plea, but had not yet been sentenced (R.T. 720-22).

Shaw was arrested in February, 1971, for his participation in the alleged scheme (R.T. 682). He was charged with three counterfeiting counts (App. at 18-21, 23), entered not guilty pleas (App. at 26) and then, with Jones, pleaded guilty to Count 1 (conspiracy to commit counterfeiting) on May 25, 1971 (App. at 28). He testified on January 18, 1972, but, like Jones, had not yet been sentenced, because his sentencing was continued a number of times at the request of his attorney and the prosecutor. (R.T. 682-84.)

The history of the cases of Jones and Shaw, and the sentences they finally received after testifying for the government, are discussed in detail in argument number 2,

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4. As used herein "App." refers to the Appendix to petitioner's Opening Brief on Appeal, submitted to aid the Court of Appeals in taking judicial notice of certain federal district court and state court records pertaining to other cases involving Gerald Shaw, Kenneth Jones, Bobby Evans, Judith Guilmette, Michael Tomlin and David Gorwitz. Said Appendix is part of the record on appeal and will be certified and transmitted to this Court at petitioner's request. Petitioner's request will be directed to the clerk of the Court of Appeals pursuant to Rule 21 of the Rules of the Supreme Court, and will be made prior to action on this petition by this Court.

below. Their pleas of guilty were entered before Judge Carr, the presiding judge at petitioner's trial. Judge Carr also presided over the sentencing phase of Shaw's and Jones' cases.

Evidence of the alleged conspiracy to commit counterfeiting, introduced at petitioner's second trial, consisted of the testimony of Jones and Shaw.

Shaw testified that he had previously been convicted of counterfeiting in 1966 and 1968. (R.T. 675.) He was released from prison in June, 1970, and he and Jones met in September, 1970. (R.T. 678.) Each tried to minimize his participation in the alleged scheme. Shaw testified that Jones came to him, said he was in trouble, and asked Shaw's help in obtaining some money. Shaw said he did not want to get involved. (R.T. 663.) On the other hand, Jones testified that Shaw first called him and that Shaw first brought up the idea of acquiring counterfeiting plates. (R.T. 724-25, 728-29.) Jones had been convicted on an unspecified state charge[5] and was to be sentenced on October 2, 1970. He said he had a meeting with Benken, petitioner, and James Armstrong in which Benken and petitioner said they knew someone with some "power" in the District Attorney's office and they could help him with his case. Jones was to give Benken and petitioner his 1970 Cadillac and to acquire for them counterfeiting plates for the manufacture of $20.00 bills. (R.T. 688-89.)

Shaw agreed to help Jones. He made the counterfeit plates and gave them to Jones. (R.T. 664-66, 730-31, 736.) Jones gave one side of a plate to Armstrong so he could have

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5. Explained further in argument number 2, below.

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an expert look at it. On October 2, before he went to court for sentencing, Jones gave Benken the ownership certificate for his Cadillac. (R.T. 690.)

Jones then appeared in court for sentencing on October 2. In court he met an attorney named David Kwan, who, along with another attorney, represented Jones at the hearing. Jones did not pay Kwan for his services. He testified that he was not sentenced on October 2, but the record does not show the final disposition of the case. (R.T. 692-93.)

When Jones left the courthouse he found Benken and petitioner waiting outside for him. They drove to a coffee shop where Benken said, "Well, you didn't think we could really do it, did you?" (R.T. 694.) Petitioner then said that Jones was a member of an organization whether he liked it or not and told Jones to get the counterfeiting plates so they could start printing right away. That same afternoon, Jones gave the plates to Armstrong. He had no other personal meetings with petitioner. (R.T. 695-98.)

A few days after October 2, Jones met with Benken, who said that another $5,000.00 was required to get Jones out of the state case. Jones paid Benken $5,000.00 four or five days later. (R.T. 699-700.)

Jones later received a phone call from someone who identified himself as "Casino."[6] The caller said that the person who had arranged to do the printing was not going to do it and another printer had to be found. Benken, Armstrong, and Jones then met at a restaurant and Benken

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6. Petitioner was known to Jones by the name "Casino."

said that the printing had to be done right away. Benken then left the table, called Jones to a telephone, and Jones spoke to "Casino," who said Jones would have to do the printing. (R.T. 701-03.) Jones then contacted Shaw, they bought a printing press, Armstrong and Clarence Forrest obtained the paper, and they printed abut $150,000.00 worth of counterfeit notes. (R.T. 670-74, 704-09.) Benken and petitioner were not present during the printing process. (R.T. 674.)

Armstrong told Jones to deliver $40,000.00 of the notes to a place called the Pink Panther. Jones went to the Pink Panther, met Benken and petitioner there, told them he had the money, and then followed them in his car to a place in the country. Jones there told Benken and petitioner he did not have the money but that Armstrong would deliver the money after Jones called him with instructions. Jones then called Armstrong and told him Benken and petitioner wanted Armstrong to bring the money to the Topper Club in 30 minutes. Jones drove to the Topper Club and waited about thirty minutes until Armstrong arrived and said that Benken and petitioner had received the money. (R.T. 711-16.) Armstrong and Forrest later took the remainder of the money. (R.T. 718.)

Shaw never met or talked with petitioner. He first saw petitioner when he appeared for the trial of this case. (R.T. 679.) Jones was the only witness who testified that petitioner was involved in the initial manufacture and distribution of the money.

The testimony of the prosecution witnesses other than Jones and Shaw implicated petitioner only in the distribution or passing of counterfeit bills–the same activity in which

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the witnesses themselves were engaged and for which each of them, except Bobby Evans, received probation.

Petitioner did not testify and offered no evidence.

REASONS FOR GRANTING THE WRIT

1. The Judgment Of The Court Of Appeals To Remand Petitioner's Case For Re-Sentencing Does Not Satisfy The Constitutional Guarantees Of Due Process And The Eighth Amendment.

The Court of Appeals inferred from the evidence that the trial court may have imposed four additional years of punishment on petitioner as a penalty for his exercise of the constitutional rights not to plead guilty and to a jury trial. (Opinion of the Court of Appeals, Appendix pp. 2 - 4.) However, the court also said (Appendix p. 3):

> "While we do not believe that the experienced trial judge actually punished the defendant for standing trial, the record leaves unrebutted the inference drawn by the defendant."

As an apparent consequence of this *belief* in the legitimate motivations of the trial judge, the court remanded the case for re-sentencing without any recommendation or determination of the punishment to be imposed. This is clearly an inadequate remedy, both practically and constitutionally. The remedy is impractical in that the trial judge will be confronted with the choice of reducing petitioner's sentence, and thereby admitting a constitutional violation, or imposing the same penalty and declaring for the record that the additional four years was not imposed to punish petitioner for

going to trial. The latter course is inevitable. The proper remedy would be either (a) to reduce the sentence to three years, (b) invalidate the four-year additional sentence and remand for re-sentence of three years, or (c) remand for re-sentence by another judge. The latter course is suggested in *Mayberry v. Pennsylvania,* 400 U.S. 455, 465-66, 91 S. Ct. 499, 27 L. Ed. 2d 532, 540 (1971). There, a defendant in a criminal contempt proceeding appealed from an 11-to-22-year sentence imposed by the trial judge, whom defendant vilified during the course of the trial. This Court vacated the judgment and remanded the case to another judge. The Court found the slandered trial judge could not be expected to maintain that calm detachment necessary for fair adjudication. Consequently, the Court held that due process could only be satisfied by remanding the case to a judge who represented the "impersonal authority of the law." (*Id.* at 466, 27 L. Ed. 2d at 540.)

Judge Carr has become personally involved in the disposition of petitioner's sentence. To reduce petitioner's sentence would necessarily be an admission of his participation in a violation of petitioner's constitutional rights. At the very least, due process requires that petitioner's case be remanded to an impartial judge for re-sentencing. (*Mayberry v. Pennsylvania, supra.*)

Additionally, the constitutional guarantee of due process prohibits discriminatory enforcement of penal laws. (*Yick Wo v. Hopkins,* 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220, 227 (1886); *Cochran v. Kansas,* 316 U.S. 255, 62 S. Ct. 1068, 86 L. Ed. 1453 (1942); *Dowd v. United States ex rel Cook,* 340 U.S. 206, 71 S. Ct. 262, 95 L. Ed. 215 (1951); *United States v. Steel,* 461 F.2d 1148 (9th Cir.

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1972); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).) In the present case, Benken, co-conspirator with petitioner, received only three years on Count 4. Petitioner received seven years on the same count. The prosecutor admitted that Benken was at least an equal participant with petitioner in the alleged crime. Benken's prior conviction was for assault with a deadly weapon and possession of explosives, far more serious offenses than petitioner's prior conviction for mail fraud by the use of credit cards. Petitioner would have received three years if he had pleaded guilty. The only difference between Benken and petitioner was petitioner's insistence on a jury trial. The Court of Appeals deemed itself compelled to recognize the unrebutted inference that Judge Carr had imposed the four additional years solely because petitioner had exercised his constitutional rights. Thus, the evidence strongly suggests that petitioner was selectively sentenced because he exercised his constitutional right to a jury trial. Such discrimination is invidious and a violation of due process. (*Cf. United States v. Steel, supra.*) The appropriate remedy to be invoked is the elimination of the four-year period from petitioner's sentence. Under such circumstances the reviewing courts may, and indeed should, interfere with the sentencing court's discretion. (See *Snowden v. Smith*, 413 F.2d 94, 96 (7th Cir. 1969).)

The Eighth Amendment protection against the imposition of cruel and unusual punishments prohibits the infliction of a sentence upon petitioner in excess of three years. It is settled that it is "possible for the length of the sentence to be so disproportionate to the offense as to fall within the [Eighth Amendment] inhibition" against cruel and unusual punishments. (*Black v. United States*, 269 F.2d 38, 43 (9th

Cir. 1959).) Petitioner contends that where the court has decided that three years is an appropriate sentence for an offense, a seven-year sentence for that offense, imposed for unconstitutional reasons, is disproportionate.

In *Robinson v. California,* 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), the Supreme Court held violative of the Eighth Amendment the punishment of the mere status of narcotic addiction. The Court reasoned:

> "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a cold." (370 U.S. at 667, 8 L. Ed. 2d at 763.)

If it is cruel and unusual to punish a man because he is a narcotic addict, it is at least as cruel and unusual to punish a man because he exercised his constitutional rights. Chief Judge Harris, of the Northern District of California, in *Jordan v. Fitzharris,* 357 F. Supp. 674, 679 (N.D. Cal. 1966), identified three elements of a test for cruel and unusual punishments: (1) under all the circumstances, is the punishment of such character as to shock general conscience or to be intolerable to fundamental fairness, such judgment to be made in the light of developing concepts of elemental decency; (2) is the punishment greatly disproportionate to the offense for which it is imposed; (3) does the punishment, although applied in pursuit of a legitimate aim, go beyond what is necessary to achieve that aim. This case passes all three tests: (1) punishing a man for invoking his constitutional rights shocks the conscience

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in the light of our developing standards of decency; (2) the punishment is disproportionate to the offense to the extent that it is imposed not for the offense but for accepting constitutional protections; (3) finally, punishing the defendant for exercising constitutional rights is not a legitimate aim of punishment.

It is unthinkable that any enlightened, constitutional government would tolerate the punishment of its citizens for accepting the promises of their constitution. This Court's statement in *Trop v. Dulles*, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630, 642 (1958), is particularly appropriate:

> "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this right be exercised within the limits of civilized standards."

(See also Mosk, *The Eighth Amendment Rediscovered*, 1 Loyola L. Rev. 4 (1968).)

In light of the unrebutted inference that the four-year additional sentence was imposed upon petitioner because he elected to exercise his constitutional right to stand trial, the four-year period should be set aside as cruel and unusual punishment.

Conclusion

The judgment of the Court of Appeals to remand petitioner's case for re-sentencing does not secure for petitioner his Fifth Amendment right to due process nor his Eighth Amendment right not to be subjected to cruel and unusual punishment. The judgment should be modified to eliminate the four-year additional period. (*United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960).) If this remedy should

be deemed not to be required, then at the very least due process requires that re-sentencing be conducted by another judge upon remand. (*Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66, 91 S. Ct. 499, 27 L. Ed. 2d 532, 540 (1971).)

2. The Method By Which The Government, With The Cooperation Of The Trial Court, Obtained The Testimony Of The Two Chief Government Witnesses Deprived Petitioner Of Due Process Of Law.

Gerald Shaw and Kenneth Jones were the two chief witnesses for the government. Their testimony alone pointed to petitioner and Benken as the originators and planners of the alleged counterfeiting scheme. Their testimony was given under the pervasive influence of subsequent imposition of sentence in their own cases by Judge Carr, the same judge conducting petitioner's trial.

Following is a chronological summary of the history and background of the cases of Shaw and Jones and the "sentences" they finally received as prizes for their performance on the witness stand.

Gerald Shaw

March 16, 1966: Shaw was indicted (Case No. 35930) in the federal court on four counterfeiting counts. (App. at 1-4.) The bail information form indicates that he had no prior criminal record and that he was arrested in possession of eighty-five $20.00 ($1,700 total) counterfeit notes in his vehicle. (App. at 5.)

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April 26, 1966: Shaw pleaded guilty to Counts 1 (making counterfeit money) and 4 (possession of counterfeit money) and was sentenced as follows: Count 1, imprisonment for 2 years suspended on condition he serve 180 days in jail and placed on probation for five years. (App. at 6-7.) Thus, for a *first offense*, he was required to serve six months in jail and a five-year term of probation.

April 3, 1968: He was indicted (Case No. 1855) in the federal court on two counterfeiting counts. (App. at 11-13.) The file reflects that he was still on probation. (App. at 14.)

April 8, 1968: He pleaded not guilty on both counts. (App. at 15.)

May 7, 1968: He changes his plea to guilty on Count 2 (possession of counterfeit money). (App. at 16.)

June 3, 1968: He was sentenced to prison for one year, the sentence to run consecutively to the sentence received for the 1966 conviction in Case No. 35930. (App. at 17.)

July 8, 1968: A hearing on a petition to revoke Shaw's probation in the 1966 case (No. 35930) because of his conviction in the 1968 case (No. 1855) was held. Shaw admitted the violation and was sentenced as follows:

(a) The probation previously granted on Count 1 was revoked and he was sentenced to prison for the remainder of the two-year term (one and one-half years, since he had served six months), and the Board of Parole was given the power to determine parole eligibility under 18 U.S.C. Section 4208(a)(2). The sentence was to commence after service of the sentence on Count 4.

(b) The probation previously granted on Count 4 was revoked and he was sentenced to prison for 180 days, to run consecutively to the sentence on Count 1.

(c) The sentences on each of Counts 1 and 4 were to run consecutively to the one-year sentence imposed in the 1968 case (No. 1855). (App. at 8-10.)

Thus, for these two offenses, Shaw received a total sentence of three and one-half years in prison or jail. The last three years of the sentence began on June 3, 1968.

June, 1970: Shaw testified in the present case that he was released from prison at this time. (R.T. 678.) Thus, he served a total of about two and one-half years (the first six months and then the additional two years).

September, 1970: Shaw met Jones about three months after his release from prison and began planning a resumption of counterfeiting activities. (R.T. 678-81.)

February, 1971: He was arrested on the present offenses (R.T. 684) and was indicted on three counts. (App. at 18-21, 23.) He was apparently still on parole at that time. He was arraigned on February 11, 1971. (App. at 24.)

March 22, 1971: Shaw's case was assigned to Judge Charles Carr, the trial judge in petitioner's case. Shaw entered not-guilty pleas. (App. at 25-26.)

March 29, 1971: The case was set for jury trial on May 25, 1971. (App. at 27.)

May 25, 1971: Shaw changed his plea to guilty on Count 1 (conspiracy to commit counterfeiting) and the case was continued for sentence to June 21, 1971. (App. at 28.)

June 21, 1971: Judge Carr continued the case for sentencing to August 23, 1971, six days after petitioner's case was set for trial. (App. at 29; R.T. 253.)

August 17 and 18, 1971: Petitioner's first trial began on August 17 (R.T. 253), a mistrial was declared on August 18 (R.T. 569), and a second trial was scheduled for November 16,

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1971. (R.T. 572.)

August 23, 1971: Judge Carr continued Shaw's case to December 6, 1971, for sentencing. (App. at 30.)

Although the record does not reflect the reason, petitioner's case was not tried on November 16, 1971, but was continued to January 18, 1972. Therefore, petitioner's case had not been tried when Shaw came up for sentencing on December 6.

December 6, 1971: Judge Carr continued Shaw's case for sentencing to February 28, 1972, "on the request of Counsel for both sides." (App. at 31.) The prosecutor was John F. Walter, who represented the government in petitioner's case.

January 18 and 19, 1972: Petitioner's case was tried. Shaw testified on January 18. (R.T. 363.) Petitioner was found guilty on January 19 (C.T. 61) and Judge Carr ordered a probation investigation and report and continued the case for sentencing to March 13, 1972. (C.T. 64.)

February 28, 1972: Shaw and Jones appeared for sentencing but Judge Carr ordered a supplemental probation report "by request of counsel" and continued the case again for sentencing "at request of counsel," to March 13, 1972, the same day petitioner was to be sentenced. (App. at 32.)

March 13, 1972: The following proceedings occurred:

(a) Judge Carr sentenced petitioner to five years in prison on Count 1 and seven years on each of Counts 2, 3, 4, and 6. (R.T. 954-55; C.T. 66.)

(b) Judge Carr imposed and suspended execution of a five-year prison term for Shaw and Jones, *granted them probation for three years with no confinement*, and dismissed Counts 2, 3, and 4. (App. at 33-35.)

Kenneth Jones

Jones' prior criminal history is shown in Los Angeles Superior Court case number A-163000 and the probation report filed in that case. (App. at 67-87.)

1958 - 1964: He was arrested several times for various offenses such as contributing to the delinquency of a minor, suspicion of burglary, and traffic warrants. He was not convicted of any but the traffic offenses. (App. at 78.)

August 23, 1965: He was convicted of burglary (California Penal Code Section 459) and forgery (California Penal Code Section 470). He received a suspended sentence, three years' probation, and a $300.00 fine. The probation report indicates that Jones was a member of a group of ten to fifteen persons involved in burglaries, "a larger, more sophisticated operation that had been continuing for some time." His co-defendant was a man named Armstrong (possibly the unindicted co-conspirator in the present case). (App. at 78-79.)

July 14, 1969: Jones was arrested again for burglary. (App. at 79.) He and a co-defendant were charged with burglary (Penal Code Section 459) and receiving stolen property (Penal Code Section 496). (App. at 67-68.)

April 3, 1970: The probation officer prepared his report after Jones had been convicted of receiving stolen property. (App. at 76-87.) Following is the probation officer's evaluation and recommendation:

> "Evaluation:
>
> "This is the case of a 31-year-old defendant who has twice been convicted of illegally dealing with the property of others. It appears from the statements of the defendant's creditors that he is avoiding his debts and is a continuing

menace to the property of others. It would appear that an accurate appraisal of the defendant's verbal statement would suggest that he feels remorse for having been caught, not for violating the law.

"It is felt that the public deserves protection from men such as the defendant and that this could best be accomplished by institutionalization, since the defendant was found to have become involved in the present offense while already on probation supervision as the result of attempting to pass stolen checks. While the defendant was on probation supervision he was ordered to remain away from a co-defendant in the stolen and forged checks matter, which he apparently did, but defendant was able to secure the cooperation of a co-defendant in this matter, a man on federal probation for possession of counterfeit money, and committed a similar offense. This would suggest that the defendant not only involves himself in illegal activities but has been successful in contributing to the delinquency of others.

"**Recommendation:**

"It is recommended that probation be revoked and sentence imposed in Case A-311690 and that probation be denied in Case Number A-163000." (App. at 86-87.)

September, 1970: Jones met with Shaw and began planning the counterfeiting program that led to the present case. (R.T. 678-81, 723-29.) The chronology relating to the

present case is the same as set forth above for Shaw.

June 7, 1971: Pursuant to stipulation, Jones' state conviction was reversed on the ground that it appeared from the record that he had not personally waived his right to a jury trial. (App. at 7.) The case was then set for trial in September, 1971 (App. at 71) and continued to March 6, 1972 (App. at 73-74).

March 6, 1972: Seven days before Jones was sentenced in the present case, the Superior Court sentenced him to six months in the county jail, suspended execution of that sentence, and placed him on probation for three years. The record does not show whether the United States Attorney was in contact with the state authorities but does show that on March 6, 1972, Jones waived probation referral, indicating that a sentence satisfactory to Jones had been arranged.

This chronology vividly illustrates that the influence on Shaw and Jones of prospective sentencing was maintained by the government and the trial judge throughout petitioner's trial. After Shaw and Jones changed their pleas to guilty and appeared for sentencing, their cases were continued by Judge Carr, at the request of counsel for defendants and for the government, four times. Each time it was continued to a date shortly after it was anticipated that petitioner's trial would be concluded. When petitioner's case was continued, Jones' and Shaw's cases were continued. They finally received exceptionally lenient sentences ten months after they pleaded guilty and on the same day petitioner was sentenced. The relationship of these continuances and the gift of lenient sentences to petitioner's case was no coincidence.

In its brief on appeal, the government ignored the obvious

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implications of the aforementioned facts, which were raised in petitioner's brief on appeal, and did not deny (1) that the prosecutor arranged with Shaw and Jones and their counsel that the sentencing of these defendants would be continued until after they testified against petitioner, (2) that the prosecutor promised to do what he could to obtain lenient sentences for the witnesses in return for their testimony, (3) that the sentencing of the witnesses was repeatedly continued so that they would not be sentenced until after they testified against petitioner, and (4) that they were finally given *undeservedly* lenient sentences because they testified against petitioner. Thus, the conclusion is inescapable that the government and trial judge granted extremely favorable treatment to Shaw and Jones *in exchange* for their testimony against petitioner.

Where a defendant pleads guilty to one count and promises to testify against his co-defendants in exchange for the prosecution's intercession in the sentencing phase of his case, he necessarily–and correctly–assumes that the sentence he finally receives will be measured by the extent of the benefit he confers on the government by his testimony. The tendency is inevitable that he will color, shade, and slant his testimony–if not flatly perjure himself–in favor of his benefactor, the prosecution. The judge reinforces this tendency by repeatedly granting motions to continue the sentencing until after the testimony, so that the government and the court can keep the sentence hanging over the witness' neck until he performs.

The procedure of continuing the sentencing of the witness until after he testifies has two vital effects, both of which are extremely advantageous to the prosecution

and at the same time destructive of the integrity of the fact-finding process and the defendant's right to a fair trial:

(1) It provides a strong incentive to the witness to give testimony that is either perjured or biased in the prosecution's favor. The witness remains subject to the power of the prosecution and court to seek and impose a heavy penalty if the witness does not cooperate. The witness knows that he must please the prosecutor to gain his favor. This means doing what he can to assure the defendant's conviction. Thus, the court and prosecutor have, in practical effect, joined forces to create what is undoubtedly in most cases an irresistible incentive for the witness to commit perjury or, at the very least, to slant his testimony in favor of the prosecution and against the defendant. In either case, the defendant's right to a fair trial has been nullified. For the witness the choice is clear: he can either serve a long prison term or he can help the prosecution. We would be naive, indeed, if we pretended not to know which choice he will invariably make.

(2) It deprives the jury of a fact essential to a proper evaluation of the witness' testimony. Because the witness is not sentenced until after the defendant's trial, the jury never knows what sentence he ultimately receives. Thus, the jury is deprived of a fact crucial to its determination of whether the witness was providing testimony for the government in exchange for favorable treatment at the sentencing stage of his case. If the jury knew that Shaw and Jones had received probation when, for example, a sentence of at least three years in prison was called for, it might well have viewed their testimony with

great suspicion.

The practice by which the government and trial court create a powerful incentive for a witness to give false and biased testimony violates due process. It is not unlike that violation of due process which occurs where a conviction is obtained through the use of evidence known to be false by representatives of the government. (See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, 1221 (1959); *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791, 794, 98 A.L.R. 406 (1934); *Pyle v. Kansas*, 317 U.S. 213, 216, 63 S. Ct. 177, 87 L. Ed. 214, 215 (1942).) It is precisely because we cannot determine whether testimony, given under circumstances creating a strong likelihood of falsity, is in fact false or biased, that this practice should be prevented.

What is needed is a prophylactic rule to forbid the practice used here and to remove such influences that are likely to produce questionable testimony. This is not a novel suggestion. The federal courts have consistently insisted upon the establishment and strict observance of procedures designed to protect against violations of constitutional rights. (See *Miranda v. Arizona*, 384 U.S. 436, 458, 465-67, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 714, 718-19 (1966) [rule requiring advice of constitutional right to counsel and to remain silent is a necessary "protective device to dispel the compelling atmosphere of the interrogation" and to remove the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely"].)

The practice of continuing the sentencing of a witness until after he has testified and the trial is concluded deprives

the jury of a fact essential to the proper evaluation of his testimony. Such a practice by the government with the cooperation of the court is akin to the withholding of critical facts by the government, condemned in *Napue v. Illinois*, 360 U.S. 264, 270, 79 S. Ct. 1173, 3 L. Ed. 2d 1217, 1221-22 (1959).

In *Napue*, one of Napue's alleged accomplices, named Hamer, testified for the prosecution and stated that he had received no promise or consideration in return for his testimony. The prosecutor had in fact promised Hamer consideration but did not correct the testimony. After Napue was convicted, the prosecutor, then a private lawyer, filed a petition for writ of error coram nobis on behalf of Hamer, who had been convicted for his role in the crime. In the petition, the lawyer alleged that as prosecuting attorney he had promised Hamer that if he would testify against Napue, " '[a] recommendation' for a reduction of [the witness] sentence would be made and, if possible, effectuated." (360 U.S. at 266, 3 L. Ed. 2d at 1219.) The Court held that the failure of the lawyer, when he was a prosecutor, to correct the witness' testimony denied Napue due process of law. The significance of the case for present purposes is not the fact that the prosecutor knew the testimony was false but that the defendant was denied due process because the jury had not been made aware of facts critical to the evaluation of the witness' testimony. The Court explained:

> "Had the jury been apprised of the true facts, however, it might well have concluded that Hamer had fabricated testimony in order to curry the favor of the very representative of the state who was prosecuting the case in which Hamer

> was testifying, for Hamer might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration." (360 U.S. at 270, 3 L. Ed. 2d at 1221-22.)

In the present case, we can reasonably assume that the same kind of promise to try to obtain a favorable sentence was made to the witnesses. But even if no express promise was made, the arrangement that the cases would be continued until after the testimony was given held out the clear implication that the witnesses would receive a reward when they were finally sentenced. In either case the effect is the same: the witness is presented with a motive to give false or biased testimony. And because the sentencing was repeatedly continued, the court and prosecutor together deprived the jury of facts that were essential to a complete evaluation of the testimony of the witnesses. This practice is especially improper in light of the availability of a grant of immunity as the method of procuring testimony from co-conspirators. (18 U.S.C. Sections 6001-6003.) Such a procedure fixes the witness' status before he testifies and allows the jury to judge the possible motivations of the witness at that time. In this case the prosecutor should have obtained the testimony of Jones and Shaw by a grant of immunity.

Conclusion

In summary, the method by which the government and court obtained the testimony of Jones and Shaw constituted a violation of due process in two ways: (1) it created a strong incentive to give false and biased testimony against petitioner, and (2) it deprived the jury of the knowledge

of facts–the rewards finally bestowed on the witnesses in exchange for their testimony–that were essential to the complete and accurate evaluation of the credibility of these witnesses. This Court should not sanction the use of the awesome powers of the government to create a setting for false or biased testimony. Nor should this Court sanction that procedure of delayed sentencing which necessarily deprives the jury of facts essential to its determination of the weight to be given particular evidence.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

JOSEPH A. BALL

ANTHONY MURRAY

ROBERT E. AITKEN

Counsel for Petitioner

Appendix:

Opinion of the court below.

APPENDIX

From the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, U. S. Court of Appeals and Post Office Building, 7th & Mission Streets, P. O. Box 547, San Francisco, California 94101.

Re: No. 72-1694 USA vs. JAMES LEE STOCKWELL

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 1-11-73 Affirmed. etc. the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Dennis R. Mathews,

Clerk of Court

OPINION OF THE COURT BELOW

In the United States Court of Appeals, for the Ninth Circuit.

UNITED STATES OF AMERICA, Appellee, v. JAMES LEE STOCKWELL, Appellant.

NO. 72-1694.

[Filed January 11, 1973]

Appeal from the United States District Court for the Central District of California.

Before: HUFSTEDLER and GOODWIN, Circuit Judges, and SKOPIL, District Judge.*

GOODWIN, Judge:

The only substantial question in this appeal from a counterfeiting conviction is whether the sentence was lawfully imposed.

Before trial, the district judge told the defendant that if he were to plead guilty to one count he would receive a three-year sentence, as did a codefendant who pled guilty. The court added that if the defendant chose to stand trial and was convicted he would receive a sentence of from five to seven years. The defendant elected to stand trial. He was convicted and given concurrent sentences of seven years for the five counts of which he was guilty. The total sentence could have been as much as fifteen years on one of the counts,

*The Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

with consecutive sentences on the others. There is no question but that the sentence was well within the statutory range of penalties, and ordinarily it would not be subject to review in this court. *See, e.g., Gollaher v. United States,* 419 F.2d 520, 529-530 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969).

Here, however, the defendant contends he was punished with four additional years in prison for taking the court's time with a trial. While we do not believe that the experienced trial judge actually punished the defendant for standing trial, the record leaves unrebutted the inference drawn by the defendant.

If there was such a use of the sentencing power, the constitutional right to trial would be impaired. *See Baker v. United States,* 412 F.2d 1069,1073 (5th Cir. 1969), *cert. denied,* 396 U.S. 1018 (1970); *United States v. Wiley,* 278 F.2d 500 (7th Cir. 1960).[1] The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand, and receives a greater punishment. *See North Carolina v. Pearce,* 395 U.S. 711 (1969).

We recognize the variety of considerations that can bear upon a sentence. A genuine admission of guilt may properly result in a lighter sentence than would be appropriate for an intransigent and unrepentant malefactor.

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1 We express no opinion on that portion of the decision in *United States v. Wiley,* 278 F.2d 500 (7th Cir. 1960), that might be thought to imply that disparities in the sentencing of codefendants are, ipso facto, subject to appellate review. Like our colleagues on the Seventh Circuit, however, we believe that "[o]ur part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful * * *." 278 F.2d at 504.

See, e.g., Gollaher v. United States, 419 F.2d at 530. However, courts must not use the sentencing power as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice.

Accordingly, once it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. *See generally* A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* § 1.8, at 36-37 (1968).

Other points urged on appeal are without merit. The judgment of conviction is affirmed, but the cause is remanded for resentencing.

Remanded.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on FEBRUARY 5, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Stockwell v. United States of America) on the following named parties by depositing TWO COPIES thereof and THREE COPIES thereof as designated below, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

THE SOLICITOR GENERAL OF THE UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20520 THREE COPIES

UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
U. S. COURTHOUSE - 12TH FLOOR
LOS ANGELES, CALIF. 90012 TWO COPIES

I declare under penalty of perjury that the foregoing is true and correct.

Executed on FEBRUARY 5th, 1973, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1095

JAMES LEE STOCKWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner alleges a denial of his constitutional rights because the court of appeals, instead of reducing his sentence outright, remanded the case for resentencing, and because the trial court admitted into evidence the testimony of the two co-conspirators who had pleaded guilty but had not yet been sentenced.

After a second jury trial in the United States District Court for the Central District of California,[1] petitioner was convicted on five counts of having possessed and delivered counterfeit Federal Reserve notes and having conspired to do so, in violation of 18 U.S.C. 472, 473, and 371. He received concurrent prison sentences of which the longest were seven years (Tr. 954-955).[2] The court of appeals

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[1]The first trial of petitioner and co-defendant Jan Benken ended in a mistrial. Prior to the second trial, Benken pleaded guilty to one count of the indictment.

[2]"Tr." refers to the trial transcript.

affirmed the convictions but remanded for resentencing to give the district judge an opportunity to reduce the sentences if he had attached any weight to petitioner's refusal to plead guilty (Pet. App. 2).

The evidence shows that Kenneth Jones, a co-conspirator who testified at trial while awaiting sentence on a state conviction, met with petitioner, Jan Benken, and one "Whitey" Armstrong, who offered to use their influence to "get [him] out of [his] case." The agreed price was Jones's new Cadillac and a set of plates for printing counterfeit $20 bills (Tr. 687-689). Jones turned over his car and was not sentenced on his conviction. At the request of petitioner and Benken he also turned over the plates to Armstrong (Tr. 690-695, 697). About a month later, petitioner called Jones to say that a printer was needed (Tr. 701). After petitioner, Benken, and Armstrong demanded that he get the printing done, Jones enlisted the help of Gerald Shaw. Together they purchased the necessary equipment and printed a quantity of counterfeit $20 bills, which were delivered to Armstrong (Tr. 703-705, 715-716). Shaw and Jones were arrested as a result of their activities. Both were awaiting sentence at the time of petitioner's trial (Tr. 675, 720).

Bobby Evans, Judith Guilmette, and David Gorwitz were among the unindicted co-conspirators. According to their testimony, each had discussions with petitioner relating to the passing of counterfeit bills. Subsequently, each received counterfeit bills from petitioner and attempted to pass them. All three were arrested. The charges against Evans were dropped, but Guilmette and Gorwitz pleaded guilty and prior to petitioner's trial were sentenced to terms of probation (Tr. 768-779, 785-792, 816-825).

1. It is undisputed that petitioner's seven-year combined sentence is well within the statutory maximum of

fifty years' imprisonment and a $30,000 fine for the various offenses of which he was convicted. Petitioner objects because a sentence of three years was imposed upon co-defendant Benken, who pleaded guilty, and because the trial judge indicated that petitioner might receive a three-year sentence if he were to plead guilty to a single count. He finds no answer to this complaint in the fact that the court of appeals remanded for resentencing.

In sentencing co-defendant Benken, the trial court noted that he would have to serve at least five or six years of three consecutive state sentences before being eligible for parole (Tr. 587). A concurrent sentence of three years was imposed on the federal charge. The court then ascertained from the Assistant United States Attorney that Benken and petitioner were equally involved in the counterfeiting scheme (Tr. 589). He stated that, in the event of a conviction, petitioner could expect a sentence of no less than five years (Tr. 590). In response to a question from counsel, the court ventured that his "offhand reaction" would be to impose a three year sentence upon a plea of guilty to one count (Tr. 591). Petitioner elected a jury trial and was convicted on all five counts.

At the time petitioner was sentenced, the court considered a probation report which recommended a substantial prison term (Tr. 937-938), as well as petitioner's record, which included a recent conviction on nineteen counts of mail fraud (Tr. 938-940, 943-947). The Assistant United States Attorney pointed out also that the probation officer had been unable to obtain satisfactory information concerning the nature of petitioner's current employment (Tr. 949, 951). Determining that petitioner's record indicated no evidence that he had reformed, the court sentenced him to seven years' imprisonment (Tr. 953, 955).

The decision in *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7), on which petitioner relies, is inapposite. There, the defendant, who was only a minor participant in the crime, received a sentence much greater than those imposed on more culpable co-defendants who pleaded guilty, and was denied probation because of the judge's policy not to consider probation for one who stood trial. Here, in contrast, petitioner was an equal participant in the scheme and was convicted on five separate counts, while his co-defendant was convicted on only one. This alone would warrant a more severe sentence. In addition, however, the court considered other factors, including petitioner's prior record and unfavorable probation report, not available to him during the pre-conviction conference at which he suggested his "off-hand" reaction as to possible sentences. See *United States* v. *Levine*, 372 F. 2d 70 (C.A. 7), certiorari denied, 388 U.S. 916. See also *Gollaher* v. *United States*, 419 F. 2d 520, 530 (C.A. 9), certiorari denied, 396 U.S. 960. In any event, the question of the proper sentence has been re-opened by the court of appeals which has remanded to the district court for resentencing under clear instructions precluding consideration of petitioner's determinition to stand on his right to a jury trial.

In challenging the remedy fashioned by the court below, petitioner asserts that his sentence should be reduced by four years or, alternatively, that the case ought to be remanded to a different judge for resentence. First, we note that to remove four years from petitioner's sentence would result in the same sentence for conviction on *five* counts that the trial court tentatively suggested for conviction on *one* count. We submit that this would constitute undue interference with the discretion of the sentencing court. Second, petitioner's claim that the sentencing judge has become "personally involved" in the dis-

position of this case is wholly without merit. The record reveals no suggestion that the personal feelings of the trial judge have clouded his exercise of discretion or that he will prove unable on remand to resentence petitioner dispassionately.

2. Petitioner also contends that the government should not have been permitted to introduce the testimony of co-conspirators Shaw and Jones, who at the time of petitioner's trial were still awaiting sentence after several postponements. In petitioner's view, this practice induces witnesses to perjure themselves in hopes of leniency. Petitioner's contention, however, has been raised a number of times in comparable cases and has been uniformly rejected as bearing only on the weight of a witness' testimony, not its admissibility. *United States* v. *Insana*, 423 F. 2d 1165, 1168 (C.A. 2), certiorari denied, 400 U.S. 841; *United States* v. *Boswell*, 372 F. 2d 781, 784 (C.A. 4), certiorari denied *sub nom. Hellams* v. *United States*, 387 U.S. 919; *United States* v. *Vida*, 370 F. 2d 759, 767 (C.A. 6), certiorari denied, 387 U.S. 910; *Lemons* v. *United States*, 339 F. 2d 761 (C.A. 9), certiorari denied, 380 U.S. 985. See also *Lisenba* v. *California*, 314 U.S. 219, 227; *Hoffa* v. *United States*, 385 U.S. 293. Here, petitioner raised no objection at trial to the admission of the testimony of Shaw and Jones. But counsel was permitted considerable latitude on cross-examination to develop possible motives for testimony favorable to the government.[3]

[3]The fact that Shaw and Jones were awaiting sentencing after several postponements was specifically brought to the jury's attention (Tr. 682-684, 722). Thus, this case is clearly distinguishable from *Napue* v. *Illinois*, 360 U.S. 264, relied upon by petitioner, in which evidence relating to the credibility of a witness was concealed from the jury. It was precisely because of this concealment that the trial was held to have been tainted. Here, in contrast, the witnesses' possible motive for cooperating with the prosecution was fully explored before the jury.

Of course, the relevant consideration for the jury is whether the witness believes his testimony may result in a reduced sentence. Whether or not he in fact does subsequently receive such a sentence has no bearing on the credibility of his testimony.

In addition, the court carefully instructed the jury in regard to the weight of accomplice testimony and the factors affecting the credibility of witnesses (Tr. 897, 902-903); petitioner offered no objection to the charge (Tr. 915-917).

We note finally that the cases of three other co-conspirators—Evans, Guilmette and Gorwitz—were disposed of prior to the time they testified against petitioner, and their combined testimony was sufficient to support a conviction on all five counts, even disregarding the testimony of Shaw and Jones.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1973.